

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 27, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP1699**

**Cir. Ct. No. 2013CV225**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**AMOS FINANCIAL, LLC,**

**PLAINTIFF-APPELLANT,**

**V.**

**KENNETH J. LANGESLAY AND ELAINE M. LANGESLAY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Burnett County:  
J. MICHAEL BITNEY, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. As a sanction for failing to comply with a court order and several civil procedure statutes, the circuit court dismissed Amos Financial, LLC's lawsuit to enforce a loan agreement against Kenneth and Elaine Langeslay. Amos contends the order dismissing its lawsuit is void because the

circuit court failed to provide adequate notice that dismissal was a possible sanction for Amos' conduct. We conclude the dismissal order is not void because WIS. STAT. § 805.03 (2015-16),<sup>1</sup> provided constructive notice that dismissal was a possible sanction. We lack jurisdiction to consider Amos' other arguments regarding the dismissal order. Amos has failed to develop any argument that the circuit court erred by denying Amos' subsequent WIS. STAT. § 806.07 motion to vacate the dismissal order. Accordingly, we affirm.

### **BACKGROUND**

¶2 Amos filed the instant lawsuit on October 9, 2013, seeking to enforce a loan agreement against the Langeslays. Amos was represented by attorney Jesse Ammerman, who worked for the Milwaukee office of the law firm Blitt & Gaines, P.C.

¶3 The Langeslays answered Amos' complaint on November 4, 2013. For the next fifteen months, Amos took little or no action to pursue its lawsuit. Then, on February 2, 2015, Amos moved for summary judgment. However, Amos concedes on appeal that its summary judgment motion was incorrectly sent to the Langeslays' counsel's prior address. The Langeslays assert their attorney did not receive the motion, and in ordering dismissal of Amos' complaint the circuit court similarly found that the Langeslays' attorney "was never served the motion or otherwise copied on its ... filing."

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 The circuit court’s findings of fact further state that, on June 25, 2015, the court “took it upon itself to schedule a conference call amongst counsel. [Amos] did not affirmatively prompt the [c]ourt to do same. It was the [c]ourt’s own administrative recognition that caused the further development of this case.” Following that conference call, the court issued a pretrial and scheduling order on July 10, 2015. As relevant here, the order provided: “Mediation will be conducted by: David Richie[.] ... Mediation will involve all parties and princip[als] with decision-making authority and will be completed no later than December 31, 2015.” The order also stated a motion hearing would take place on January 14, 2016, at 1:30 p.m. at the Barron County Justice Center.

¶5 A mediation was subsequently scheduled for December 21, 2015, at 11:00 a.m. The circuit court found that Amos failed to comply with Richie’s request to provide a case brief prior to the mediation. Ultimately, neither Ammerman nor any representative of Amos appeared at the mediation. The circuit court found that:

- The mediation was scheduled three months in advance by Ammerman, the Langeslays’ counsel, and Richie’s staff;
- Ammerman failed to inform either the Langeslays’ counsel or Richie that he would not be appearing at the mediation;
- The Langeslays traveled from Houston, Texas, to Eau Claire in order to attend the mediation;
- The Langeslays and their attorney waited at Richie’s office for one hour on the mediation date, and thirty-five minutes of that time were

spent unsuccessfully attempting to reach Ammerman or another attorney at Blitt & Gaines by phone or email;

- Later that afternoon, an attorney from Blitt & Gaines called the Langeslays' attorney and blamed Amos' failure to appear on "a change in personnel within the firm"; and
- No notice of retainer was filed before the mediation indicating that Ammerman no longer represented Amos.

¶6 According to the circuit court's findings, on January 11, 2016, the Langeslays' attorney faxed a letter to the court seeking permission to file a motion to dismiss Amos' complaint for lack of prosecution.<sup>2</sup> The court found that the January 11 letter was emailed to counsel of record and included a copy of the proposed motion. The court further found the letter suggested that "the hearing set[] for January 14, 2016[,] be stricken given the lack of filing and service of a summary judgment motion" by Amos.<sup>3</sup>

¶7 The circuit court's findings additionally indicate that, on January 12, 2016, the court faxed a letter to counsel for both parties stating the court would hear both motions—i.e., Amos' summary judgment motion and the Langeslays' motion to dismiss—at the January 14 hearing. The court also found that the clerk of court called Blitt & Gaines and left a voicemail regarding the hearing. In

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<sup>2</sup> The record does not contain a copy of the January 11, 2016 letter or the circuit court's response. *See infra* ¶7. The Langeslays have included these documents in the appendix to their appellate brief. However, an appendix cannot be used to supplement the record. *See Reznichuk v. Grall*, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

<sup>3</sup> At the January 14 hearing, the Langeslays' attorney explained he was unaware when he drafted the January 11 letter that any summary judgment motion had been filed by Amos.

addition, the court found that the Langeslays' attorney "faxed his January 11, 2016 correspondence to the same fax number the Clerk used for [Amos'] counsel to ensure that [Amos'] counsel possessed" the Langeslays' motion to dismiss.

¶8 The Langeslays' attorney appeared in person at the January 14, 2016 hearing, and attorney Adam Benson appeared telephonically on behalf of Amos. Benson told the court Blitt & Gaines had contacted him earlier that morning in search of local counsel and had sent him "some paperwork." Benson called Ammerman, who was still listed as the attorney of record on the case, and learned that Ammerman was no longer employed by Blitt & Gaines. Benson then traveled to the Burnett County courthouse to review the file and attend the hearing, at which point he learned the hearing was actually scheduled to occur in Barron County, "which [Blitt & Gaines] failed to tell [him]."

¶9 The circuit court asked Benson whether he was "up to speed enough" to address either Amos' summary judgment motion or the Langeslays' motion to dismiss. Benson had previously indicated he "ha[d] a copy of the summary judgment motion in front of [him]," but he told the court he was "not ... prepared to hear any other motion." He explained:

I was told it was a summary judgment motion. This company that hired me is going to hear from me and I'm going to ask to withdraw as counsel in this matter. They brought me in under false pretenses, to be quite honest, and I'm not going to do business with them.

The court granted Benson's motion to withdraw, and Benson did not further participate in the hearing.

¶10 The circuit court subsequently denied Amos' summary judgment motion in an oral ruling, reasoning that, even if the motion had been properly

served on the Langeslays' counsel, summary judgment would be inappropriate because there were disputed issues of fact regarding "the underlying basis for the debt or what may or may not have been done in the interim to try to cure any alleged defaults." The court then found that Amos had "failed to prosecute the matter in a timely fashion as was previously ordered by the [c]ourt." The court also found that Amos had failed to prepare for and attend the court-ordered mediation. Based on these findings, the court granted the Langeslays' motion to dismiss "for failure to prosecute in violation of [WIS. STAT. §] 805.03."

¶11 On January 25, 2016, the circuit court entered a written order for dismissal, which contained thirty-five findings of fact. In addition to the findings discussed above, the court found that:

- Amos disobeyed a court order by failing to prepare for and attend the mediation;
- Amos violated the civil procedure statutes by failing to serve its summary judgment motion on the Langeslays' attorney;
- Amos violated the civil procedure statutes by failing to provide discovery responses within the prescribed timeframe;
- Amos violated the civil procedure statutes by failing to file an updated notice of retainer; and
- Amos "failed to prosecute its claims by its inaction in most all stages since the filing and service of the Summons and Complaint."

In addition to dismissing Amos' complaint, the court awarded the Langeslays \$9,570.09 in attorney fees and costs.

¶12 Amos did not timely file a notice of appeal from the circuit court's January 25 order. Instead, it moved to vacate the January 25 order, pursuant to WIS. STAT. § 806.07. As the basis for its motion to vacate, Amos argued the court had failed to provide adequate notice that dismissal was a possible sanction for Amos' alleged failure to prosecute, and the dismissal order therefore violated Amos' right to due process.

¶13 In a written decision dated July 15, 2016, the circuit court observed that Amos' argument would have merit if the January 25 dismissal order had been based solely on Amos' failure to prosecute. However, the court found the dismissal order was based primarily on Amos' violations of civil procedure statutes and a court order, and under those circumstances, Amos had constructive notice under WIS. STAT. § 805.03 that its conduct could result in dismissal of its complaint. The court therefore denied Amos' motion to vacate. Amos subsequently filed a notice of appeal from the circuit court's July 15 order.

## **DISCUSSION**

¶14 Although Amos filed its notice of appeal from the circuit court's July 15 order denying its motion to vacate, Amos does not cite WIS. STAT. § 806.07 on appeal or specifically develop any argument that the circuit court erred by denying the motion to vacate. Instead, Amos' appellate arguments are directed toward showing that the court erred by dismissing its complaint in the first instance. Specifically, Amos argues: (1) the January 25 dismissal order is void because Amos did not have adequate notice that dismissal of its complaint was a possible sanction for its actions; (2) by taking up the Langeslays' motion to dismiss at the January 14, 2016 hearing, the court failed to afford Amos sufficient

notice of the motion or time to respond to it; and (3) dismissal was an inappropriate sanction because Amos' conduct was not egregious.

¶15 The Langeslays respond that we lack jurisdiction to consider these arguments because Amos did not timely appeal the January 25 order. It is undisputed that the January 25 order was a final order for purposes of appeal. It is also undisputed that Amos did not timely file a notice of appeal from the January 25 order. As a general matter, “[t]he filing of a timely notice of appeal is necessary to give the court jurisdiction over [an] appeal.” WIS. STAT. RULE 809.10(1)(e).

¶16 In response to the Langeslays' argument regarding appellate jurisdiction, Amos emphasizes that it has challenged the January 25 order as void based on a lack of adequate notice that dismissal was a possible sanction. *See Neylan v. Vorwald*, 124 Wis. 2d 85, 95, 368 N.W.2d 648 (1985) (stating dismissal without notice violates due process, and “[j]udgments entered contrary to due process are void” (quoting another source)). As Amos notes, “A judgment or order which is void may be expunged by a court at any time. Such right to expunge a void order or judgment is not limited by statutory requirements for re-opening, appealing from, or modifying orders or judgments.” *Kohler Co. v. DILHR*, 81 Wis. 2d 11, 25, 259 N.W.2d 695 (1977) (quoting *State ex rel. Wall v. Sovinski*, 234 Wis. 336, 342, 291 N.W. 344 (1940)); *see also Goldberg v. City of Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 523, 340 N.W.2d 558 (Ct. App. 1983). We therefore have jurisdiction to consider Amos' argument that the January 25 dismissal order is void for lack of notice. However, we lack jurisdiction to consider Amos' other arguments, and we therefore do not address them further.



¶17 The circuit court dismissed Amos’ complaint as a sanction under WIS. STAT. § 805.03, which states in relevant part:

**Failure to prosecute or comply with procedure statutes.**

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).<sup>[4]</sup> Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.

¶18 Amos asserts, “In an unbroken line of cases, the Wisconsin Supreme Court has held that a dismissal with prejudice is not permitted under WIS. STAT. § 805.03, unless the offending party has actual or constructive notice that such conduct will result in a dismissal with prejudice.” The Langeslays concede this is a correct statement of the law. However, case law also establishes that § 805.03, in and of itself, provides constructive notice that dismissal is a possible sanction for a party’s failure to comply with court orders.

¶19 For instance, in *Trispel v. Haefer*, 89 Wis. 2d 725, 736, 279 N.W.2d 242 (1979), our supreme court held that WIS. STAT. § 805.03 provides “sufficient notice to attorneys practicing in this state of the action which a court may take after a party’s failure to comply with pre-trial orders.” Several years later, the court distinguished the type of notice that is required when sanctions are imposed for failure to prosecute from the type of notice required when sanctions are imposed for failure to comply with a court’s orders. See *Neylan*, 124 Wis. 2d at

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<sup>4</sup> The orders authorized under WIS. STAT. § 804.12(2)(a) include orders “dismissing the action or proceeding or any part thereof.” Sec. 804.12(2)(a)3.

92-93. The court concluded “actual notice” is required when a sanction is imposed for failure to prosecute because § 805.03 “does not state any time limit within which trial must proceed after commencement of the action and therefore does not import any constructive knowledge to litigants or their counsel of the outside time limits a court will consider as being a ‘failure to prosecute[.]’” *Neylan*, 124 Wis. 2d at 92-93. Conversely, in cases involving sanctions for failure to comply with court orders, the “constructive notice” provided by § 805.03 is sufficient to satisfy due process because the objectionable conduct—failure to comply with a court order—is “precise and ascertainable by a party.” *Neylan*, 124 Wis. 2d at 90, 93.

¶20 Thereafter, in *Buchanan v. General Casualty Co.*, 191 Wis. 2d 1, 12, 528 N.W.2d 457 (Ct. App. 1995), this court similarly stated:

[I]t is well settled that when a court imposes sanctions for failure to comply with a court order under [WIS. STAT.] § 805.03 ... no prior notice is required. Instead, the statute provides sufficient notice to parties practicing law in this state that a trial court may dismiss a claim for noncompliance with its orders.

(Citations omitted.)

¶21 In its January 25 order dismissing Amos’ complaint, the circuit court found that Amos violated a court order requiring it to prepare for and attend mediation. The court further found that Amos violated various civil procedure statutes by failing to serve its summary judgment motion on the Langeslays’ attorney, failing to timely provide discovery responses, and failing to file an updated notice of retainer.<sup>5</sup> Under the cases cited above, Amos had constructive

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<sup>5</sup> Amos does not dispute on appeal that it violated civil procedure statutes and the court’s order to prepare for and attend mediation.

notice by virtue of WIS. STAT. § 805.03 that these violations could result in sanctions, including the dismissal of its complaint.<sup>6</sup>

¶22 Our decision is not altered by the fact that the circuit court stated in its oral ruling it was granting the Langeslays’ motion to dismiss “for failure to prosecute in violation of [WIS. STAT. §] 805.03.” We acknowledge that, in its written decision, the court found that Amos “failed to prosecute its claims by its inaction in most all stages since the filing and service of the Summons and Complaint.” However, these references to Amos’ failure to prosecute do not convince us any additional notice was required, beyond that provided by § 805.03. In addition to citing Amos’ failure to prosecute, the court specifically relied on Amos’ violations of a court order and civil procedure statutes in granting the Langeslays’ motion to dismiss. As explained above, § 805.03 provides constructive notice that such violations may result in sanctions, including dismissal. Thus, even absent any alleged failure to prosecute, Amos had constructive notice its violations of a court order and procedural statutes could result in dismissal of its complaint.

¶23 We therefore reject Amos’ argument that the January 25 order dismissing its complaint is void because the circuit court failed to provide adequate notice that dismissal was a possible sanction for Amos’ conduct. As noted above, we lack jurisdiction to review Amos’ other arguments regarding the

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<sup>6</sup> *Trispel v. Haefer*, 89 Wis. 2d 725, 279 N.W.2d 242 (1979), *Neylan v. Vorwald*, 124 Wis. 2d 85, 368 N.W.2d 648 (1985), and *Buchanan v. General Casualty Co.*, 191 Wis. 2d 1, 528 N.W.2d 457 (Ct. App. 1995), involved violations of court orders. They did not address the notice required in cases involving violations of civil procedure statutes. However, *Neylan*’s reasoning regarding violations of court orders is equally applicable to violations of civil procedure statutes. In both situations, the objectionable conduct—violating a court order or violating a procedural statute—is “precise and ascertainable by a party.” *Neylan*, 124 Wis. 2d at 93.

January 25 order, and Amos has failed to develop any argument on appeal that the circuit court erred by denying its motion to vacate. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Accordingly, we affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

